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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 946

LOUIS KAUFMAN,

Petitioner,

against

THE UNITED STATES OF AMERICA,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

J. BERTRAM WEGMAN,
HAROLD SIMANDL,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 946

LOUIS KAUFMAN,

Petitioner,

against

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

A

Summary Statement of the Matter Involved

The Indictment

By an indictment filed in the United States District Court for the Southern District of New York on March 18, 1943, petitioner, together with others, was charged with a conspiracy in violation of Section 420a, Title 18, U. S.

Code, commonly known as the Anti-Racketeering Act. It was charged that Frank Nitto (or Nitti), Louis Compagna, Paul DeLucia, Phil D'Andrea, Francis Maritote, Charles Gioe, Ralph Pierce, John Rosselli and petitioner, defendants, together with George E. Browne, William Bioff and Nick Circella, confederates, and with *divers other persons to the grand jurors unknown,* conspired on or about June 18, 1934, and continuously thereafter to and including the date of the filing of the indictment, *in the Southern District of New York,* in connection with and in relation to acts affecting foreign and interstate trade and commerce, to obtain by the use of force, violence and coercion the payment of money from a group of named corporations and other firms, persons and corporations, *whose names were said to be to the grand jurors unknown,* who were described as the victims.

It was alleged that the defendants and confederates conspired to extort payments from the victims by the threat of obstructing and interfering with the production, interstate distribution and exhibition of motion pictures.

The alleged instrumentality was the power of a labor union, the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (commonly known as the IATSE).

The three confederates named were connected with the IATSE as international president, personal representative of the president and international representative, respectively, and your petitioner was business agent of Local 244 (in Newark, N. J.) of the said union.

Motions

Petitioner joined in the preliminary motions made on behalf of other defendants. These are discussed in their

petition and brief, and so are not here repeated. Petitioner also made a separate motion for a bill of particulars, which was denied.

Petitioner repeatedly moved for a severance (R. 45, 79, 948-949, 2735, 3214, 3335).

The Trial

Bioff and Browne testified for the Government. In brief their story was that in the early part of 1934[1] they had several meetings at Riverside, Illinois, a suburb of Chicago, with Nitto, Compagna, DeLucia and Circella. Also present and participating in one or more meetings were Frank Rio and Louis Buchalter (R. 136, 141, 1036, 1038). Though identified to the grand jury who heard the very same testimony as that given at the trial (R. 802-807, 1281-1284), these two are not named in the indictment.

At these meetings an understanding was reached that Browne would be a candidate for the office of international president of the IATSE at its convention in June, 1934, and that the others would use underworld connections, which they claimed extended throughout the country, to insure his election so that control of the union could be used to make money for the conspirators (R. 138-141, 145, 1037-1041).

Browne was elected president of the union without opposition (R. 1041). Thereafter by instigating or encouraging demands by locals of the IATSE upon theatre operators in their respective cities,[2] Browne and Bioff created

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[1] The exact dates were not established (R. 136, 141), but they were prior to June 18, 1934, when the Anti-Racketeering Act first became law.

[2] Chicago (R. 168-169), New York (R. 196-199) and unnamed cities on the West Coast. They made no such claim regarding Newark, N. J., where petitioner's local, No. 244, is located. This is noteworthy, since if petitioner were in fact a member of this conspiracy, his locale would hardly have been so omitted.

situations in which they were able to collect tribute from the operators in return for settling the threatened strikes. They then made demands upon producers of motion pictures and succeeded in obtaining large sums from them (R. 216-220, 262-267).

Representatives of the "victims" testifying for the prosecution were asked what was in their minds (*though not disclosed*) when they made payments to Bioff. They were permitted to testify, over objection, that they were in fear of strikes which would close the theatres and the producing studios and ruin their companies, and also that they feared bodily harm. This testimony brought in references to bombs, stink bombs, damage to theatres, danger to patrons, and murders.

The first mention of petitioner in the evidence came in Bioff's testimony concerning the Riverside conferences at which the conspiracy was claimed to have been hatched. According to Bioff, one of the underworld connections then mentioned was with a certain "Longie" Zwillman in New Jersey (R. 140). Bioff (though Browne made no reference thereto) said that in the discussion of means to be used to assure Browne's election, Louis Buchalter[3] volunteered to see Zwillman and see to it that he "delivered" Kaufman (R. 145; cf. R. 1038-1039). Zwillman is not named in the indictment, although he, too, was named in the testimony before the Grand Jury (R. 802-807).

Parenthetically it may be noted that Bioff and Browne testified (R. 156, 1047, 1048) that they were introduced to the underworld connections (whom they named though the indictment did not), but never met Zwillman and did not know him.

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[3] Better known as "Lepke". At the time of this trial Buchalter was receiving wide publicity as the convicted chieftain of "Murder, Inc." and was under sentence of death for murder.

Based upon this hearsay testimony, which petitioner immediately moved to strike out, the prosecutor was permitted to proceed as though thereby petitioner had been connected with the conspiracy. He was permitted to introduce other testimony regarding Zwillman (R. 256-258, 1110, 3064, 3102), argue in the presence of the jury upon the assumption that Zwillman actually brought petitioner into the conspiracy (R. 3103, 3629, 3639, 3649-3651, 3656, 3658), and, by further hearsay testimony from Bioff linking their names, suggest a connection which was never proved. There was no attempt to prove that Buchalter ever did communicate with Zwillman, or that Zwillman even knew petitioner at the time.

Petitioner sought an instruction that this testimony could not be used to connect him with the conspiracy. The Trial Court refused (Request No. II, R. 3785, denied R. 3737). Instead, the jury was directly charged that such testimony was "*not alone sufficient to establish a connection* * * *". The Circuit Court of Appeals said this was "*other testimony connecting Kaufman*".

There was testimony of payments (aggregating $20,500) made by Warner Bros. to petitioner between 1936 and 1940 (R. 992-996). The first payment was made after negotiation of a wage contract in the Newark area had been fully completed, without any threat of strike, and with an increase in wages (R. 977, 991-992; Exh. UU, R. 4004).

No explanation of the payment was offered. The officer who directed the payment, one Bernhard, was available (R. 1635), but was not called. Instead the two subordinates (Jacocks and Morgenroth) who, as mere messengers, delivered the money to petitioner, testified. Neither had had any prior discussion about money with petitioner (R. 979). Neither knew anything about the proposed payment until they were called to New York and received the money

from one Patterson, with instructions to give it to petitioner (R. 954, 991). Patterson was dead at the time of the trial. The Court, over objection, permitted Jacocks, one of these messengers, to testify that the payment was induced by fear that the theatres would be closed and the studios would be closed (R. 959-962). No basis for his putative fear was shown. No reason for paying was expressed at the time. Jacocks made it clear that there had never been any labor trouble in the area of petitioner's local, nor ever any threat of any kind whatsoever by petitioner (R. 979). He had no fear of petitioner. He had not been threatened by anyone.

Bioff testified that after talking with Phelps (who was in charge of labor relations for Warner Bros.), late in 1936, he told Nitti that he had learned that Kaufmann had been paid $15,000; that he asked Nitti whether he should see Kaufman and get some of it or let Kaufman keep it. Nitti's answer was that Kaufmann should not be bothered; that he was Longie's man. The Court, after agreeing that it should be stricken as hearsay, changed his ruling and permitted this testimony to stand when the prosecutor argued that it would illuminate "whatever arrangement they may have had with Longie Zwillman". No such arrangement was ever shown nor was any implied in the conversation (R. 256-258).[4] The jury was permitted to consider this as evidence connecting petitioner, through Zwillman, with the Chicago defendants.

It was testified that petitioner had asserted on two or three occasions that he had had to take the $15,000 "across

[4] The opinion below paraphrases the testimony thus: "* * * Nitti had told him to let it pass, because Kaufman was Zwillman's 'man' *and would arrange the matter with him.*" As the emphasized words show, even the Circuit Judges accepted the prosecutor's argument as evidence. The witness made no such statement. If the Circuit Court of Appeals was so misled, can it be said that the jury did not fall into the same error?

the river" (R. 959, 992). He is alleged to have said three years later that he gave it to Bioff (R. 967, 996). There was no testimony that he ever mentioned any of the other defendants, or that he ever met any of them, or that he so much as knew of their existence.

The Court below said this testimony showed that petitioner "could not have been unaware that Bioff was not acting for himself". Why not does not appear. Then follows the *non sequitur* that petitioner was "therefore acquainted with the conspiracy"!

The testimony of Bioff and Browne referred to petitioner in terms appropriate to an outsider (R. 256-257, 1110). Both Bioff and Browne were willing witnesses for the prosecution. It is a matter of court record in the Southern District of New York that their sentences were reduced and they have been set at liberty in reward. They were at the very heart of the alleged conspiracy and the agents for its business. They professed to know all its intricacies. Neither said that petitioner was connected with the conspiracy, and Bioff directly denied that he was a member (R. 921, 943-944).

The other payments to petitioner were clearly independent of the least possible connection with the case. They were never so much as mentioned by Bioff (Browne never mentioned *any* of the payments). By the testimony of the "victim" they were shown to be quite apart from the crime charged, and since they show disassociation, are, if anything, exculpatory. Yet by the Court's charge, the jury was allowed to consider these payments as proof of guilt.

The prosecutor called as a witness one Roach, in an attempt to establish that petitioner, in association with Zwillman, had sent a package to Nitti in Chicago. Roach's testimony was shown to be so utterly false that the Court ordered Roach taken into custody as a perjurer (R. 2953,

2954). (It does not appear, however, that he has even yet been prosecuted for this venal offense.) Although the Court instructed the jury to disregard Roach's testimony in its entirety (R. 3717), the jury was not admonished to disregard the prosecutor's use of it in his summation (R. 3629).

Other testimony relating to petitioner concerned: another hearsay conversation between Browne and Nitti, which it has been argued showed a connection between Nitti and Zwillman, and in turn between Zwillman and petitioner (R. 1110); an occasion in 1932, upon which petitioner accompanied two other representatives of Local 244, and one of the other men placed a gun on a desk (R. 952-953); and a meeting of the local, at which petitioner is said to have made remarks which were claimed to be a threat against anyone present who should testify against him (R. 2301, 2309).

The payments, other than those to petitioner, made by the various victims amounted to well over a million dollars; in every instance arranged by and with Bioff. But Bioff had no connection with the payments to petitioner; the circumstances of those payments were altogether different.

The prosecutor misstated evidence and put before the jury alleged facts not in evidence. His summation was inflammatory, and as to petitioner it demanded his conviction in the expressed hope that he would thereby be constrained to testify against Zwillman. The Court refused effective admonition and denied proper requests for instructions.

The jury rendered a verdict against all of the defendants except Ralph Pierce, against whom the Court dismissed the indictment. Petitioner was sentenced to seven years' imprisonment and to pay a fine of $10,000, and the remain-

ing convicted defendants were sentenced to ten years' imprisonment and were each fined $10,000.

The other defendants except Maritote[5] have by their counsel, Wm. Scott Stewart, petitioned this Court for a writ of certiorari. Effort, in the interest of brevity, has been made to avoid repetition of matter set forth in their petition and brief, which, it is prayed, may be considered incorporated herein by this reference, as to matters applicable to all defendants.

B

Jurisdictional Statement

An appeal was taken to the Circuit Court of Appeals for the Second Circuit, which filed its opinion affirming the judgments of conviction on December 20, 1944 (R. 4191). A petition for rehearing was filed in due course and was denied on January 8, 1945 (R. 4202). The judgment and order for mandate is dated January 11, 1945 (R. 4203). Issuance of the mandate was stayed as to this petitioner pending this application.

The opinion of the Court below has not yet been reported.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 347(a); Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925; and Rule XI of the Rules for Criminal Appeals, promulgated by this Court on May 7, 1934.

C

Questions Presented

1. As to the indictment:

(a) The indictment falsely alleged as unknown the names of persons known to the Grand Jury and named in the

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[5] Maritote has filed a separate petition.

testimony before the Grand Jury and at the trial as co-conspirators.

(b) The indictment falsely alleged as unknown the name of a person who testified before the Grand Jury and at the trial as an alleged victim.

(c) The Grand Jury falsely alleged that the conspiracy was formed in the Southern District of New York, whereas the testimony before the Grand Jury and at the trial clearly placed the formation of the alleged conspiracy in Illinois.

> Question: Have the constitutional rights of the petitioner been invaded by such an indictment, and therefor should the indictment have been dismissed?

2. The indictment was in general terms. It alleged no overt act. It was couched in the words of the statute without further specification of alleged wrongdoing. Petitioner sought a bill of particulars.

> Question: Was it error to deny particularization?

3. As to the evidence:

(a) Over petitioner's objection the Trial Court admitted, and permitted the jury to consider upon the issue of the connection of petitioner with the conspiracy charged, testimony of hearsay declarations by alleged co-conspirators (including one not even named as such) made out of the presence of the petitioner, prior to the time when he is said to have joined the conspiracy, prior to the date of its formation as alleged in the indictment, and prior even to the existence of the statute creating the offense. The Trial Court refused to charge the jury as requested by petitioner, that this evidence could not be considered to estab-

lish connection. Instead the charge was given that hearsay was "not alone sufficient to establish a connection".

> Question: Is it error to permit the jury to consider such hearsay testimony for the purpose of determining the connection of petitioner with the conspiracy?

(b) Over objection, the Trial Court admitted, and permitted the jury to consider upon the issue of petitioner's connection with the conspiracy charged, testimony of declarations of alleged co-conspirators made out of the presence of petitioner, not in furtherance of the alleged conspiracy, without any proof whatever that such hearsay declarations or the subject matter thereof were ever communicated to petitioner.

> Question: Is it error to permit the jury to consider such testimony as bearing upon the connection of the petitioner with the conspiracy charged?

(c) The only direct evidence in the case concerning petitioner's alleged connection with the conspiracy charged was the testimony of the Government's principal witness directly denying petitioner's participation. The circumstantial evidence was equally consistent with the inference of innocence of the crime charged as with the inference of guilt—indeed more consistent with innocence.

> Question: (1) Is it error to hold, as the Court below did, that the verdict of the jury forecloses any consideration of the circumstances, and eliminates appraisal of the varying inferences? (2) Can circumstances as consistent with innocence as with guilt support a verdict of guilt? (3) Can such a verdict, based upon such equivocal circumstances contradicted by direct evidence from the prosecution's principal witness, be sustained?

(d) Over objection the Trial Court admitted, and permitted the jury to consider, the testimony by alleged victims of their respective undisclosed mental operations at the time of making payments years before the trial. The testimony did not refer to anything objective, nor even to anything expressed at the time to which it was related. There was no way to test the accuracy of the narrative nor to demonstrate that it was an afterthought.

> Question: Since the charge was conspiracy, is it error to allow testimony of the undisclosed state of mind of an alleged victim of the conspiracy?

(e) The Court below recognized in its summary of the evidence that the payment of $15,000 made by Warner Bros. to Kaufman in 1936 was *after* Warner Bros. had reached an agreement on the wage scale contract. The Court below apparently recognized that Kaufman had never asked for or suggested the payment. Strangely, however, the Court below then said that "there was every probability that it [the money] had been paid to avoid a breakdown in the negotiations, and a consequent strike." Not only is this assumption of probability unwarranted in any event, but it is contrary to the clear and uncontradicted testimony of all of the prosecution witnesses concerned, that no breakdown in the negotiations had ever been threatened and no strike had been threatened. True, Bioff testified that Phelps told him that Kaufman had threatened to strike, but of course that was hearsay. Phelps testified that he had not told that to Bioff, and, moreover, that Kaufman had never threatened to strike, or made any other threat of any kind whatsoever. Jacocks and Morgenroth also testified flatly that Kaufman never made threats of any kind whatsoever, directly or indirectly. The Court below then held that if Kaufman said

he had turned the money over to Bioff, "no other conclusion was possible than that he was a party to the general conspiracy."

> Question: Is it error to resort to speculation to find support for an inference upon which a presumption may in turn be based?

(f) The Court below held that "When Kaufman said that he had paid it, he was saying in substance that the money had been collected for Bioff, and he could not have been unaware that Bioff was not acting for himself. Not only was Kaufman therefore acquainted with the conspiracy, but he wished his hearers to understand that he was engaged in it." There was no actual proof that petitioner knew of anyone behind Bioff. There was no actual proof that petitioner knew of any conspiracy; there was no proof that "his hearers" knew of any conspiracy. The suggested conclusion ignores the reasonable hypothesis that petitioner might, for all that appears in the record, have assumed that the payment made was for the benefit of the union, and have indicated payment over to Bioff, his superior officer and the acting head of the IATSE.

> Question: Is the inference of knowledge permissible? Can such an inference in turn support an inference of guilty connection?

(g) The prosecution offered testimony of a statement allegedly made by Kaufman at a public meeting. The Circuit Court of Appeals held that this testimony was properly admitted since it "*was susceptible of being understood as a threat against any present who should testify against him. It was competent * * * and its admissibility did not depend upon its truth. If it 'prejudiced' Kaufman, that was precisely its entirely laudable purpose.*" It was, in fact, demonstrated beyond doubt that the statement was

not even remotely related to this case, was not a threat, that no one so understood it and that no one was thereby (or otherwise, for that matter) deterred from testifying. More important as a matter of law, there was no attempt on the part of the prosecution to show that the statement related in any degree to this case or was directed to the attention of any prospective witness; not even that there were any such witnesses. The Trial Court overruled objections to the testimony in the first instance, and denied motions to strike. A requested instruction (#11, R. 3789) that such testimony could have no tendency to prove petitioner's connection with the conspiracy was denied.

> Question: Is it error to permit the jury to consider as evidence of spoliation, and therefore of consciousness of guilt, testimony concerning conduct not shown to have any connection with the case on trial?

(h) The witness Jacocks testified:

> "Q. Will you tell us when you first officially met Kaufman, Oppenheim and Gehring? A. Approximately eleven years ago now.
>
> Q. That is the first time you officially met them? A. Yes.
>
> Q. Will you tell the jury what happened on that occasion? A. They visited me in my office and told me that they were in charge of the Essex County local of projectionists, and I have forgotten the other details, but in substance that is it.
>
> Q. Was there anything else that happened on that occasion? A. Well, Andy Gehring put a gun on my desk at that time.
>
> Mr. Simandl: I object to that and move to strike it out.
>
> The Court: Was Mr. Kaufman there?
>
> The Witness: Yes, sir, he was.
>
> The Court: The motion is denied.
>
> Mr. Simandl: I respectfully except.

> Q. Was there anything else said that first meeting that you recall? A. I do not recall the details other than to indicate to me that they were in charge of that local and it would be good business for me to get along with them."

Petitioner moved several times to strike this testimony (R. 975-976, 2730). No other testimony in the case referred to this incident. It was amply proved by every one of the prosecution's witnesses who had ever dealt with petitioner, that there never was any threat or suggestion of trouble from petitioner (R. 979, 986, 1000, 3131). There was no intimation anywhere in the proof that Jacocks thought petitioner was a bully. Nevertheless, the prosecutor was allowed to suggest (R. 3109-3110) that petitioner carried a gun, and was allowed to argue in summation that petitioner was handy with a gun (R. 3692). The Court below held that this was permissible, saying:

> "If a bully begins a negotiation by laying a firearm on the table, it is not relevant merely as such to negotiations with another person. But if later negotiations with the same person come in question and the issue includes the motives which actuated that person, it is highly relevant to show how the acquaintance began. That is too obvious to deserve elaboration."

The Court below apparently overlooked the fact, also, that Jacocks' motives were in no way involved.

> Question: Was the admission of the evidence error, and was it error to permit such use thereof?

(i) The essential means alleged for the carrying out of the alleged conspiracy was the conspirators' domination and control of the labor union. The petitioner offered to prove that at a time when his position and power in his local of the union had been impaired and suspended he

had sought the assistance of the alleged co-conspirators Browne and Bioff in his effort to regain his position and power, and such assistance and co-operation had been refused. The Trial Court refused to allow such proof.

> Question: Is it error to refuse to permit a defendant to offer such material and relevant proof upon a primary issue in the case?

(j) The Court below recognized that there never were any threats of violence; that the only threat was to call strikes. The Court below said (R. 4197):

> "As we have already said, he did not threaten them with violence; but the judge allowed the prosecutor to ask whether, when they paid the blackmail, they had been moved by fear of violence; and in a number of instances they said that they had."

> Questions: (1) Is it error to allow testimony that despite there was never any threat of violence, the "victims" mentally feared violence?
>
> (2) Is it error to allow such testimony of the undisclosed state of mind of the person addressed to add prejudicially to the language used so as to give a significantly different character to that language from its plain meaning?
>
> (3) Is it error to allow the jury to be influenced, by testimony of an undisclosed state of mind, to infer in the absence of any proof at all, or any implication in the language used, that the purpose of the threatener was to create the state of mind the "victim" now first claims was caused at the time?
>
> (4) Where, as here, the statute denounces the threat —not the state of mind induced thereby—may testimony of the undisclosed state of mind of the person threatened be accepted as proof of the guilty purpose of the threatener?
>
> (5) Most important of all, is the threat of a strike, unaccompanied by any threat of violence, such coercion as is contemplated by the act here in question?

4. As to the prosecutor's summation:

The petition here of the other defendants represented by Mr. Stewart presents questions concerning the prosecutor's summation. These questions are not here repeated, but it is requested that they be considered as though set forth. However, in considering these questions in respect of this petitioner it may be noted that whereas below the prosecutor sought to justify some of his statements on the ground that they had been evoked by the summation of counsel for the defendants, he can point to nothing whatever in the summation of this petitioner's counsel which could be said to furnish excuse.

Specifically relating to this petitioner these questions arise concerning the summation:

> Questions: (1) Where it is claimed that a defendant was brought into the conspiracy charged by another person not named in the indictment, is it proper for the prosecutor to ask the jury to draw an inference against the defendant because the alleged intermediary was not produced as a witness?
>
> (2) Where the Court ordered that a Government witness be taken into custody for perjury, is it proper for the prosecutor to urge the jury to accept the testimony of that witness? Furthermore, after the Court announced that the jury would be charged to disregard entirely the perjurer's testimony, is it proper for the prosecutor to suggest to the jury that nevertheless inferences could be drawn from the testimony?
>
> (3) Where the only testimony is purely hearsay, that one alleged conspirator, Nitti, indicated that he had some relationship with another person (Zwillman) not named as a conspirator, who was described in the hearsay, without other proof, as having some relationship with petitioner; and a third person (Buchalter—not named in the indictment) was quoted as having said that he would communicate with Zwillman, without any proof that he did, is it proper for the

prosecutor to argue and for the Court to state that there was proof of association?

(4) Where the relationship between petitioner and another person (Zwillman) was shown only by hearsay and even then as to any connection with this case, such hearsay concerned only future communication never shown to have been accomplished, is it proper for the prosecutor to argue that thereby connection had been shown and that the jury should convict petitioner so that, like Bioff and Browne who testified against the other defendants, petitioner might thereby be compelled to testify against Zwillman?

(5) Where there was no proof whatsoever that petitioner ever owned or handled a gun, is it proper for the prosecutor to argue that petitioner was "handy with a gun"?

(6) Where a Government witness was not permitted by the Court to state what another person, since deceased, had said to the witness (out of petitioner's presence), is it proper for the prosecutor to argue that inferences should be drawn against petitioner because petitioner's counsel had not waived the objection, and had not asked the witness what the conversation was?

5. As to the Court's charge:

(a) A number of questions concerning the charge have been stated in presenting the questions concerning the evidence. Other questions are presented by the other petitioners, represented by Mr. Stewart. It is respectfully requested that these be deemed to have been raised here by this petitioner, without necessity of repetition.

(b) In addition to the foregoing, the following question arises:

Question: Where the defendant did not testify and the Trial Court was asked (Request No. 23, R. 3755) to charge the jury that the "plea of not guilty served as his continuing denial of the evidence offered against

him by the prosecution pursuant to its ever-present burden of proof'' is it error to refuse so to charge?

6. As to severance:

Question: Under what circumstances and conditions is it improper to refuse a severance to one of a number of defendants?

7. As to venue and limitations:

The indictment set forth no act whatsoever alleged to have occurred in the Southern District of New York and within the jurisdiction of the Trial Court unless the charge that the defendants there conspired is so construed. While the indictment alleged that the conspiracy had been formed in the Southern District of New York, the proof and the prosecutor's theory both placed the formation of the conspiracy, if any, in the vicinity of Chicago, Illinois. There was no proof of any overt act within the Southern District of New York within the period of three years prior to the filing of the indictment.

Questions: (1) In a prosecution within the Southern District of New York where the only allegation of venue was that the conspiracy was formed in the Southern District of New York, may the prosecution be sustained upon the legal fiction that the conspiracy formed elsewhere was brought into the Southern District of New York by the commission therein of unalleged overt acts?

(2) Where the allegation as to venue is that the conspiracy was formed within the jurisdiction of the trial court, and no overt act is alleged, but the proof shows formation of the conspiracy outside the jurisdiction of the Court and there is no proof of any overt act within the jurisdiction of the trial Court within three years preceding the filing of the indictment, is prosecution in the district of trial barred by the statute of limitations (Title 18, U. S. Code, Sec. 582)?

(3) Is it error to charge the jury, as here and as approved by the Court below, that a defendant has the burden of proof of satisfying the jury that he has withdrawn from the alleged conspiracy before the Statute of Limitations begins to run? Does the burden of proof beyond a reasonable doubt—as distinguished from the burden of adducing evidence—ever shift in a criminal case?

8. Other questions, applicable to this petitioner as well, have been presented by Mr. Stewart in his petition on behalf of other defendants.

D

Reasons Relied Upon for the Allowance of the Writ.

Petitioner urges these reasons for allowing the writ:

I

The Court below dismissed as "trivial" and without other comment, petitioner's challenge to the indictment, in the light of the proof, because it had been made clearly to appear that the indictment falsely alleged as unknown the names of alleged co-conspirators and of an alleged victim of the conspiracy, and also because the indictment charged the formation of the conspiracy in the Southern District of New York, rather than in the vicinity of Chicago, Illinois, where it was actually claimed to have been made.

This case, therefore, presents the question whether grand jurors may violate their oath by falsifying the allegations of an indictment, to delude the defendants and to facilitate some ulterior purpose of the prosecutor.

It is the established rule, based upon the oaths of the grand jurors, that an averment in the indictment that the facts are unknown is presumptively true. *Coffin* v. *U. S.*, 156 U. S. 432. Where that presumption is completely over-

come, as in this case, it seems clear that the constitutional rights of the defendant have been invaded. It is not claimed, of course, that the names of all conspirators or of all victims must be set forth in the indictment. Nor is it argued that it is necessary to the sufficiency of the indictment that there be an allegation that the names are unknown. But if the allegation is made, it must be true. "A false averment in an indictment that names were unknown savors of trickery, and is most reprehensible." *State* v. *Smith*, 89 N. J. Law, 52, 97 Atl. 780.

"Where the name of the *particeps criminis* is in fact unknown to the grand jury, that body is justified by the necessity of the situation in stating that the name of such person is unknown to it; but a false recital of such fact is absolutely without legal justification." *State* v. *Faure*, 98 N. J. Law 18, 119 Atl. 4.

This is not a matter "concerned with the mere etiquette of trials and with the formalities and minutiae of procedure" (*Bruno* v. *U. S.*, 308 U. S. 287, 294). A right preserved by the Constitution is of a far "different order of importance."

"It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*." *Boyd* v. *United States*, 116 U. S. 616, 635.

In *United States* v. *Riley,* 74 Fed. 210, the late Chief Justice Taft, then a Circuit Judge, dismissed an indictment for the offense of collecting political assessments from government employees upon the ground that the names of the persons from whom the assessments were received were alleged to be unknown to the Grand Jury; whereas the proof at the trial, which was the same proof that came before the Grand Jury, identified particular employees as having made payments. Judge Taft's opinion treats the question as one of variance, but makes it clear that the misstatements did not substantially affect the defendant's ability to prepare his defense. The decision was placed squarely upon the failure to comply with the constitutional requirement that the accused be informed of the nature and cause of the accusation.

II

The indictment was a paraphrase of the statute. It afforded the defendants no information of the precise nature of the charge they were expected to meet. Various motions for bills of particulars were denied. The Circuit Court of Appeals did not deign to notice the point. In formulating the rules which are to govern procedure in Federal criminal cases, it is respectfully urged that this Court may here find occasion to specify when, and in what circumstances and to what extent, a defendant may have particularization of an indictment, thus setting limits upon the exercise of discretion below.

This Court has said (*Glasser* v. *U. S.,* 315 U. S. 60, 66) that specificity of detail falls within the scope of a bill of particulars. It appears that in the Second Circuit, particulars cannot be obtained.

III

Testimony was admitted and permitted to be used against this petitioner, that at a time when the alleged conspirators were preparing to accomplish the election of Browne it was said that through one Zwillman they would enlist petitioner's support.

The language of the declaration itself shows that petitioner could not have been a party to the conspiracy at that time. Apparently it did not even look forward to making him a party, but merely assumed that he would take orders from Zwillman.

It was never shown that the request had been transmitted to Zwillman or, *a fortiori,* from Zwillman to the petitioner.

Testimony was admitted of other conversations among other people out of the presence of petitioner, which likewise were never shown to have been communicated to petitioner, but that detailed above is itself sufficient reason for the intervention of this Court.

The decision below is directly contrary to the opinion of this Court in *Glasser* v. *U. S.*, 315 U. S. 60.

The decision of the case at bar establishes a direct conflict between the Second Circuit and the Sixth Circuit which, in *Nibbelink* v. *U. S.*, 66 F. (2d) 178, reversed a conviction because of the presence of such evidence, although in that case there was ample proof that that appellant later became connected.

The opinion below is also in direct conflict with the opinion of the Eighth Circuit in *Morrow* v. *U. S.*, 11 F. (2d) 256.

There is likewise direct conflict with the Tenth Circuit, which in *Minner* v. *U. S.*, 57 F. (2d) 506 held such declarations admissible only upon independent proof that the person against whom they are to be used was a member of the conspiracy *at the time* the declarations were made.

In the case at bar, petitioner requested an instruction to the jury (Request No. II, R. 3785) that the conversations in question could not be considered as proof to connect petitioner with the conspiracy. This request was denied (R. 3737). The Trial Court charged the jury that the declarations were "*not alone sufficient to establish a connection.*"

The Court below ignored the fact that the jury was allowed to consider this evidence in determining petitioner's connection with the conspiracy, and treated the matter as though petitioner's complaint went only to the order of proof.

IV

The only direct evidence touching petitioner was the testimony of Bioff, the Government's principal witness, that petitioner was not a member of the conspiracy. The circumstantial evidence was as consistent with innocence as with guilt.

Petitioner recognizes that this Court will not be inclined to issue its process merely because a decision below was wrong, nor even merely to correct an injustice.

Nor is petitioner's plaint merely that the Court below was mistaken on the facts (*e. g.*,—it remarked that "Kaufman may have called strikes" when nothing could be clearer in the record than that he never did—never so much as suggested the possibility of labor trouble). So far as the facts are concerned, the point now made is that the inferences which the Court below indulged were too far-fetched to be allowed to remain as a standard of what may be tortured out of proof in a criminal case.

The Court below recognized that the payment of $15,000 made by Warner Bros. to petitioner in October 1936 was in point of time after all negotiations had been completed.

There were no conversations with petitioner in advance of the payment.

After the payment was made, petitioner is alleged to have said on several occasions that he had delivered the money to Bioff.

From the assumption that because petitioner had asked Bioff's help in getting a raise for his men and Bioff had spoken to Warner Bros. in that connection (incidentally, assuring Warner Bros. that Kaufman would not strike), the Court below jumped to the conclusion that the money "had been paid to avoid a break-down in the negotiations, and a consequent strike". It is submitted that the fact not only fails to support this inference, but is contrary to it.

The Court below then continued "If in addition to this, Kaufman told the truth when he said that he had paid the whole amount to Bioff, no other conclusion was possible than that he was a party to the general conspiracy. Obviously, he would not have done so, unless he expected some equivalent, either by way of profit or of immunity. There may be honor among thieves, but there is no maudlin munificence".

Here again the gap between fact and inference is too wide for spanning. (The Court below assumed that Bioff had denied receipt of this money from Kaufman, but the record is clear that there is no such denial.)

Since Bioff was the *de facto* head of the Union in which petitioner was a local official, it is certainly as reasonable to suppose that petitioner dealt with him as such, rather than as a representative of a subterranean conspiracy of which petitioner was never shown to have had any knowledge. In this situation, petitioner may have been doing no more than his duty, not indulging in any "maudlin munificence".

In this respect, the opinion below is in direct conflict with the decisions in the Third Circuit in *Grant* v. *U. S.*,

49 F. (2d) 118 and *Graceffo* v. *U. S.*, 46 F. (2d) 852; the Fifth Circuit in *Kassin* v. *U. S.*, 87 Fed. (2d) 183; the Sixth Circuit in *Tucker* v. *U. S.*, 224 Fed. 833; the Eighth Circuit in *Dahly* v. *U. S.*, 50 F. (2d) 37 and *Salinger* v. *U. S.*, 23 F. (2d) 48; and the Ninth Circuit in *Terry* v. *U. S.*, 7 F. (2d) 28.

In all these other circuits it has been held that circumstances consistent with any reasonable theory of innocence are insufficient to support an inference of guilt.

Certainly the circumstance is susceptible of other inferences than that petitioner was a member of this conspiracy. That being so, the decision below conflicts with the decision of the Eighth Circuit in *Turinetti* v. *U. S.*, 2 F. (2d) 15, 17, that such a circumstance is "robbed of all probative value".

The Court below drew a further conclusion: "When Kaufman said he had paid it, he was saying in substance that the money had been collected for Bioff, and he could not have been unaware that Bioff was not acting for himself". It is submitted that no basis is shown for the supposed awareness. There was no evidence to show that Kaufman had any idea that Bioff had any associates, or was acting for anybody else. Then the Court below added a further inference, that Kaufman was "therefore acquainted with the conspiracy".

It is respectfully submitted that this series of inferences, one built upon the other, is contrary to the decision of this Court in *Direct Sales Co.* v. *U. S.*, 319 U. S. 703. See also, *U. S.* v. *Ross*, 92 U. S. 281, 283-4.

Certainly the Court below had no right to indulge in any inference of knowledge, because knowledge must be proved and not merely inferred. But even more certainly, before any such inference could ever be considered it is at least required that the jury should have been charged meticulously upon the subject and specifically cautioned against

being prejudiced by the mass of evidence against other defendants which had been put forward in the eleven weeks of trial. Instead, the charge, so far as it touched the matter of knowledge at all, was in general terms, unrelated to the facts in evidence and altogether inadequate to prevent confusion in the jurors' minds (*cf.* dissenting opinion of Frank, J., in *U. S.* v. *Liss*, 138 F. (2d) 995, 1003).

Moreover, it is not within "proper standards for the enforcement of Federal Criminal law" that the Court below, in holding that the jury could have inferred connection from circumstantial evidence, ignored the fact that the jury was permitted to consider the hearsay testimony *along with* that evidence. Even if there were room to indulge the inferences drawn by the Court below, it cannot be said that the jury did so. They may have used the hearsay in determining whether petitioner was connected, as, under the Trial Court's charge, they were quite at liberty to do.

V

The Court below held that there was properly submitted to the jury testimony that petitioner in January, 1942, made a statement at a meeting, that some people in the room wanted to have him in jail, but he would not go to jail; that he would be there and alive when the others were dead and that they would not die a natural death.

Passing the point that it was conclusively demonstrated by petitioner in his defense that the statement had no possible reference to the case at bar, it is urged that the Court below was in error in holding that it was laudable to prejudice Kaufman by such testimony, regardless of its truth, because it was susceptible of being understood as a threat against those who might testify against him.

The Court below completely ignored the fact that the prosecutor made no attempt whatever to associate the

statement with the case at bar. Its only possible relevancy was upon the theory of spoliation of evidence, but to qualify on that theory it must appear to have direct connection with the case on trial. 16 C. J. 555, 556, Sec. 1075; *Wigmore on Evidence*, 3d Ed., Vol. II, Sec. 277; *Jones on Evidence*, Sec. 83. See also, *Bryant* v. *Stilwell*, 24 Penn. 314, 318.

The Court also permitted testimony that on an occasion in 1932, long prior to the enactment of the statute on which this prosecution was founded and long prior to any possible conception of the conspiracy charged (regardless of the date of that statute), another union official, in the presence of Kaufman, had placed a gun on a table while talking to an official of Warner Bros. There was not the least intimation that it was done to cause fear, or for any ulterior purpose. (This incident was the basis for the prosecutor's statement in summation that *petitioner* was "handy with a gun".)

The Court below held this evidence admissible by assuming, contrary to the clear fact, in series (1) that petitioner was a bully, despite proof by the prosecution's own witnesses that he had never made any threat of any kind under any circumstances, and had never "bullied" anybody, and (2) that petitioner had demanded money from the witness Jacocks. The Court below said that the relevancy was "too obvious to deserve elaboration". If the unfounded assumptions are deleted, it seems too obvious that there was no possible relevancy to this conspiracy, particularly since it was not even charged that petitioner had any "bullying" function to perform.

The petitioner's character was not in issue.

The ruling below, therefore, appears to be directly contrary to the decisions in this Court in *Boyd* v. *U. S.*, 142 U. S. 450, and *Byrd* v. *U. S.*, 180 U. S. 356. It is in direct conflict with the decision of the Fifth Circuit in *Railton* v. *U. S.*, 127

F. (2d) 691 and the Sixth Circuit in *Eley* v. *U. S.*, 117 F. (2d) 526.

VI

The prosecution contended, as the indictment charged, that the means by which the conspiracy operated was the control of the IATSE and its various locals.

Petitioner offered to prove (R. 3079-3081) that in January, 1936, petitioner's local was in the hands of a Receiver under a decree of the Chancery Court of New Jersey; that it was unable for that reason to undertake wage scale negotiations for its members; that the decree had other far-reaching effects touching the IATSE; that petitioner sought the assistance of the General Executive Board of the IATSE in contesting the decree of the Chancery Court; that such Executive Board authorized Browne to furnish assistance; that Browne gave no assistance of any kind.

The proffered evidence went to the heart of the question of control of the Union, because it would have shown that Browne and Bioff, with power so to do, did nothing whatever to assist Kaufman in regaining some measure of control of his own local.

The evidence was excluded.

The Court below ignored the point.

The decision in the case at bar seems to be directly contrary to the opinions of this Court in *Edwards* v. *U. S.*, 312 U. S. 473, 482 and *Crawford* v. *U. S.*, 212 U. S. 183, 203.

VII

The prosecutor's summation was uninhibited by any restraining influence of the Trial Court. On the contrary, the remarks of the Trial Court when objections were made, amplified the prejudice of the prosecutor's statements.

Thus, the prosecutor was allowed to say, in the absence of any proof thereof, that there was proof of association

between Zwillman and the Chicago defendants, and to ask the jury to draw an inference against petitioner because Zwillman and Buchalter were not produced as witnesses.

The prosecutor was allowed to ask the jury to convict petitioner so that he might thereby be constrained by the conviction, as had Bioff and Browne in the case of the Chicago defendants, to become a Government witness so that Zwillman could be prosecuted. A requested instruction (Supplemental Request, R. 3790) that the jury disregard this argument, was refused (R. 3737) and its substance was nowhere charged.

Although petitioner's counsel had pleaded with the Court to refuse to allow the witness Roach to testify (R. 2335-2337 and 2361-2362) and although thereafter Roach's perjury was demonstrated beyond doubt (R. 2953-2954) the prosecutor at first sought to have the jury credit Roach's testimony, and when the Trial Court announced that the jury would be instructed to disregard Roach's testimony entirely, the prosecutor sought to have the jury draw an inference that Roach had been planted by the defense (R. 3626-3629). He deliberately distorted the efforts of petitioner's counsel to demonstrate Roach's perjury (R. 2882-2889).

There are many other transgressions. Some have been printed in Mr. Stewart's brief on behalf of other petitioners in this case and in an appendix thereto.

The ruling of the Court below that the prosecutor's conduct was within "permissible limits" seems to be directly contrary to the ruling of this Court in *Berger* v. *U. S.*, 295 U. S. 78, 89.

VIII

None of the defendants testified. The Trial Court was asked (Request No. 23, R. 3755), to charge the jury that a "defendant's plea of not guilty serves as his 'continuing

denial of the evidence offered against him by the prosecution pursuant to its ever-present burden of proof.' " This request was denied (R. 3736). The Court below ignored the point.

This appears to be in direct conflict with the ruling of the Third Circuit in *U. S.* v. *DeAngelo*, 138 F. (2d) 466, 469.

IX

It is, of course, elementary that Federal Courts being of limited jurisdiction, venue must be made affirmatively to appear. In the case at bar the only allegation of venue is that the conspiracy was formed in the Southern District of New York. If this be treated as an allegation of fact, then the indictment clearly should have been dismissed for failure to prove venue, since there can be no doubt that the proof showed—and the prosecutor so argued—that if there were any conspiracy it was formed in the vicinity of Chicago, Illinois.

If, on the other hand, the allegation is treated as a conclusion of law based upon the legal fiction that the conspiracy was brought into the Southern District of New York by the commission therein of an overt act, then it would seem that at the least there should have been some identification, if not specification, of such overt act. Of course, no overt act is alleged.

The point now presented does not seem to have been passed upon before, and it was dismissed without mention by the Court below, under the general characterization of all attacks upon the indictment as "trivial".

(Of course, the decision in the case at bar was only two days after the decision of this Court was published in the case of *U. S.* v. *Johnson*, No. 43, October Term 1944, decided December 18, 1944.)

It is respectfully submitted that if the indictment could be found and tried in the Southern District of New York predicated upon this conclusion of law, in turn based upon a legal fiction, then it was at least requisite that the prosecution show affirmatively the commission of an overt act within the Southern District of New York within three years prior to the filing of the indictment, even though none at all had been alleged.

Mr. Stewart on behalf of other petitioners has presented the question and has argued the point, which petitioner begs leave to adopt by this reference, that the Court below erred grievously in holding that the burden of proof was upon the defendants to establish withdrawal from the conspiracy more than three years prior to the filing of the indictment.

But beyond that point, it is submitted that the legal fiction by which a conspiracy is brought within a state other than the one of origin, cannot be indulged in the case of a conspiracy which is a complete offense as soon as formed, unless that legal fiction is maintained by proof of an overt act within the district of trial within the period of limitations. Or, in other words, if the conspiracy is brought into the trial district only by overt act, it does not stay there after overt acts in that district cease.

Here there were no overt acts in New York within three years prior to the filing of the indictment.

X

The crime denounced by the statute here involved is the threat to use "force, violence or coercion." Here, as noted by the Court below, the only threat was to call a strike. Neither force nor violence was threatened.

That the "victims" later claimed that this threat caused fear of violence seems immaterial for two important reasons: (1) That fear was never said to have been made

known to any of the alleged conspirators, not even the accomplice witnesses. (2) This Court in *U. S.* v. *Local 807, etc.*, 315 U. S. 521, has said that the conduct of the accused must be judged only by what he or they did—not by what the employers thought.

Thus this case directly presents the question whether in the light of its legislative history, the doctrine of *noscitur a sociis* applies to the interpretation of this statute, and so whether the word "coercion," held by the Court below to include in its meaning the bare threat of strike, without threat of any violence, is that broad in its scope; or whether it is necessarily limited by the companion words "force" and "violence" to mean compulsion by strong-arm methods.

XI

As with the Questions Presented, petitioner prays that there may be considered as though incorporated herein at length the several reasons for allowing the writ not otherwise referred to herein which are set forth in the petition of Compagna, et al., filed on their behalf by Mr. Stewart.

Questions of law applicable to all the petitioners have been discussed in Mr. Stewart's Brief in support of his petition. In the foregoing specification of reasons, this petitioner has in the several points referred to pertinent authorities. Accordingly, no separate brief is filed in support hereof since the subjects seem adequately covered without further burdening the Court.

E

Conclusion and Prayer

Amazing though it may seem that all these divagations should have occurred in one case, it is apparent that it was the result of the determined effort of the prosecutor

to augment the inadequate proof by resort to doubtful and dubious means.

If it seem astounding that the Court below could have tolerated and condoned these devices, perhaps the explanation may be found in that Court's expressed belief: "The crime struck at the heart of civilized society; its very possibility is a stain upon our jurisprudence."

The Court below failed to recognize that such departures from proper standards and the accepted course of judicial proceedings were a far greater stain.

WHEREFORE, your petitioner prays that a writ of certiorari may issue out of and under the seal of this Court to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court for review and determination as provided by law this cause and a complete transcript of the record and all proceedings had herein; and that the order of the said United States Circuit Court of Appeals affirming the judgment against petitioner in this case may be reversed; and that your petitioner may have such other relief as this Court may deem appropriate.

And your petitioner will ever pray, etc.

Dated: New York, N. Y., February 12, 1945.

LOUIS KAUFMAN,
Petitioner,

By J. BERTRAM WEGMAN,
HAROLD SIMANDL,
Counsel for Petitioners.